UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Skoro

Opposition No. 104,585

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE TTAB

AUG. 11,99

Robert Schneider

v.

Gonella D. Jemison

Before Cissel, Hohein and Rogers, Administrative Trademark Judges.

An application has been filed by Gonella D. Jemison for the mark 1-800-324-HUGS for "telephone shop-at-home services in the field of stuffed toys" in class 42.[1] The application has been opposed by Robert Schneider, claiming priority of use and common law rights for the mark 1-800-949-HUGS for "telephone shop-at-home services in the field of stuffed toys, especially stuffed teddy bears"; and ownership of a federal registration for the mark SEND-A-HUG! and design for "mail order services featuring stuffed animals." Opposer alleges that applicant's use of the mark 1-800-324-HUGS in connection with the identified services would be likely to

[1] Serial No. 75/056,405, filed February 12, 1996, alleging a bona fide intention to use the mark.

cause confusion, or to cause mistake, or to deceive. Applicant has denied all the salient allegations of the opposition.

This case now comes up on opposer's motion for summary judgment, filed June 24, 1997. As grounds for his motion, opposer contends that there is no genuine issue of material fact as to his priority of use, the identity of the services, and the similarity of the marks, and that the respective services are rendered through the same channels of trade.

Applicant has responded, contending that she originated her idea prior to opposer and has been working steadily to bring it to market, receiving the telephone number in 1996; that she was not aware of opposer; and that she has not tried to trade on his goodwill.

The burden is on the party moving for summary judgment to demonstrate the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). See also, Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The evidence of record and any inferences which may be drawn from the underlying undisputed facts must be viewed in the light most favorable to the non-moving party. See, Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). In considering the propriety of summary

judgment, the Board may not resolve issues of material fact against the non-moving party; it may only ascertain whether such issues are present. See, Opryland USA, Inc. v. Great American Music Show, Inc., 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1993); and Lloyd's Food Products Inc. v. Eli's Inc., 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993).

In certain cases, however, even though disputes remain with respect to certain material facts, summary judgment may be granted, so long as all factual disputes are resolved in favor of the non-moving party and inferences drawn from the undisputed facts are viewed in the light most favorable to the non-moving party. See, Larry Harmon Pictures Corp. v. The William's Restaurant Corp., 929 F.2d 662, 18 USPQ2d 1292, 1293 (Fed. Cir. 1991); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor"); and Bishop v. Wood, 426 U.S. 341, n.11 (1976) ("In granting summary judgment for respondents, the District Court was required to resolve all genuine disputes as to material facts in favor of petitioner.").

In this case opposer has provided an affidavit and documents establishing that he has used the mark 1-800-949-HUGS in connection with the services since at least as early

as 1994[2] and that the services offered under the mark are delivery services of greetings with a bear, accessed through a telephone number.

In its response to the motion for summary judgment, applicant submitted an affidavit and documents demonstrating the efforts she has made to set up a business involving a stuffed bear which accompanies a greeting; copyrighting a drawing of a bear in connection with a "Huggi-Gram" in 1988; obtaining the telephone number in 1996; and having bears manufactured with a label displaying applicant's mark.[3]

Opposer has filed a reply brief, which we have considered.

We find, from the evidence submitted by the parties, that there exists no genuine issue of material fact that opposer's use of 1-800-949-HUGS as a service mark to identify telephone shop-at-home services in the field of stuffed toys began in 1994.

Conversely, applicant has offered no contradictory evidence on summary judgment as to priority of use. Viewing

---

[2] See Exhibit D to opposer's affidavit, which sets forth an advertisement using the service mark together with a copyright date of 1994. While opposer has submitted copies of his telephone bill for the number dating back to 1992, the bill only shows the telephone number and does not demonstrate service mark use.

[3] The initial date for manufacturing of bears is not provided. However, since the mark in question involves the telephone number, any manufacturing prior to 1996 is unrelated to use of the mark.

the evidence in the light most favorable to applicant, applicant has established that she used her mark on bears in 1996; and that she has a constructive use date of February 12, 1996 based on the filing date of the opposed application.

In that opposer has established use of his 1-800-949-HUGS mark prior to applicant's constructive use date for her 1-800-324-HUGS mark, we find that there is no genuine issue of material fact and that it is opposer who has priority of use of a telephone number mark.

We turn next to the issue of likelihood of confusion. Having carefully considered the materials and arguments submitted by the parties in connection with the issue of likelihood of confusion, we find that the parties' telephone number marks are virtually identical when considered in their entireties.

Further, there is no genuine issue of material fact that the parties' respective services are the same. Opposer has established that its services involve a person calling the 1-800-949-HUGS telephone number and ordering a personalized gift to be sent to a designated recipient. That personalized gift is a stuffed teddy bear that is called "HUGS" together with a personalized message called a "HUG-GRAM" and other items, if selected. Applicant's services are described as involving the sale of a "Huggi-

Bear" which carries a "Huggi-Gram" and provides a telephonic hug when people call to order one. Applicant's application reads "telephone shop-at-home services in the field of stuffed toys." Thus, opposer has established that the services, too, are virtually the same.

As to the channels of trade, applicant states that she does not plan to compete with the floral industry, as opposer does; and she does not set up displays in restaurants and gift shops, although her bears have appeared at an international airport. However, applicant's services, as identified in her application, are not limited to specific channels of trade and must therefore be deemed to be sold or likely to be sold in all channels appropriate for such services. Therefore, applicant's telephone shop-at-home services in the field of stuffed toys must be considered to be sold in the same channels of trade as opposer's services. Considering the virtual identity between the marks, we find that, when used on the respectively identified services, confusion is likely to result.[4]

[4] We note that applicant's response to opposer's motion includes many assertions of fact and arguments intended to establish applicant's good faith adoption of her mark and the absence of any intent to trade on opposer's good will. These are issues to be considered in the likelihood of confusion analysis, and we draw all reasonable inferences on these issues in favor of applicant. Nonetheless, other likelihood of confusion factors so favor opposer that good faith adoption and an absence of any intent to trade on opposer's good will cannot support a conclusion that there is no likelihood of confusion.

Therefore, because the Board finds that there is no genuine issue of material fact on the issues of priority and likelihood of confusion, and that opposer is entitled to judgment as a matter of law, opposer's motion for summary judgment is granted. Judgment is hereby entered against applicant, the opposition is sustained and registration to applicant is refused.

R. F. Cissel

G. D. Hohein

G. F. Rogers
Administrative Trademark
Judges, Trademark Trial
and Appeal Board